

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 14, 2012

**Elisabeth A. Shumaker
Clerk of Court**

In re:

ALBERT L. BRINKMAN,

Movant.

No. 12-3187
(D.C. No. 4:12-CV-00290-FRZ-DTF)

ORDER

Before **BRISCOE**, Chief Judge, **LUCERO** and **O'BRIEN**, Circuit Judges.

Movant Albert L. Brinkman, a Kansas state prisoner who is incarcerated in Florence, Arizona, has filed a motion for remand challenging the transfer to this court of a 28 U.S.C. § 2254 application. We deny the motion.

Mr. Brinkman was convicted in 1997 for aggravated indecent liberties with a child, two counts of sexual exploitation of a child, and two counts of aggravated criminal sodomy. He was sentenced to 136 months, 130 months, and three terms of fifteen years-to-life, all to be served consecutively. His convictions were affirmed on direct appeal. Mr. Brinkman filed his first § 2254 application in 2001,¹ which was dismissed because Mr. Brinkman procedurally defaulted his claims by failing to

¹ Mr. Brinkman filed this § 2254 petition in the United States District Court for the District of Arizona, which transferred it to the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1404(a).

present them to the state appellate court. We denied him a certificate of appealability. *Brinkman v. Stewart*, 37 F. App'x 364, 366 (10th Cir. 2002).

Before a state prisoner may file a second or successive § 2254 application, he must first obtain an order from the court of appeals authorizing the district court to consider the application. *See* 28 U.S.C. § 2244(b)(3). “A district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim until this court has granted the required authorization.” *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). Any post-conviction motion filed after an initial § 2254 application will be treated as a successive § 2254 application—and thus must comply with § 2244(b)’s authorization requirements—if it in substance or effect asserts or reasserts a federal basis for relief from the prisoner’s conviction. *See United States v. Nelson*, 465 F.3d 1145, 1148-49 (10th Cir. 2006) (“It is the relief sought; not [the] pleading’s title, that determines whether the pleading is a [28 U.S.C.] § 2255 motion.”).

In 2003, Mr. Brinkman filed a motion in district court requesting that his first § 2254 application be reinstated. The district court construed his motion as an unauthorized second or successive application and transferred it to this court so that Mr. Brinkman could seek authorization. We concluded the district court had correctly construed his motion as a successive § 2254 application and we denied authorization. *Brinkman v. Stewart*, No. 03-3237 (10th Cir. Sept. 30, 2003) (unpublished order).

In 2005, Mr. Brinkman filed another § 2254 application, which the district court transferred to this court to enable him to seek the required authorization.² *See Cline*, 531 F.3d at 1252 (permitting district courts to either dismiss an unauthorized second or successive motion for lack of jurisdiction or, if it is in the interests of justice to do so, to transfer it to the circuit court for authorization). We again denied authorization. *Brinkman v. Schriro*, No. 06-3197 (10th Cir. July 6, 2006) (unpublished order).

In April 2012, Mr. Brinkman once again filed a successive § 2254 application, without first having obtain the required circuit-court authorization to do so. The district court³ has transferred it to this court to enable Mr. Brinkman to seek the requisite authorization. In response, Mr. Brinkman has filed a motion requesting this court to remand his proposed § 2254 application to the district court for its consideration in the first instance. Mr. Brinkman does not request authorization; nor does he argue his claims meet the authorization requirements. Indeed, Mr. Brinkman articulates no reason why he believes the district court should not have transferred his claims.

² Mr. Brinkman again filed this application in the Arizona District Court, which again transferred it to the Kansas District Court pursuant to 28 U.S.C. § 1404(a), which, in turn, transferred it to this court.

³ Mr. Brinkman again filed his § 2254 application in the Arizona District Court, which transferred it directly to this court. *Brinkman v. Ryan*, No. CV-12-290-TUC-FRZ (DTF) (D. Ariz. July 23, 2012) (unpublished order).

Mr. Brinkman argues only that the district court should hear his two proposed claims. In his motion for remand, Mr. Brinkman describes his claims as follows: first, he is still incarcerated “when no valid reading of law allows it,” and second, “failures done in the interstate agreement process” resulting in “good time [credit] be[ing] taken, so as to prolong his [incarceration.]” Mot. for Remand, at 1. This differs, however, from how Mr. Brinkman presented his claims in his proposed § 2254 application. We will consider only the claims Mr. Brinkman presented in the April § 2254 application because those are what he sought to file in the district court.

There, Mr. Brinkman first claimed that his right to be free from cruel and unusual punishment was violated in some unspecified way, and that his right to a jury and due process were violated because the state court judge acted without jurisdiction and did not follow the law, but acted as the jury and decided the facts of his criminal case. He next claimed that the state court judge failed to follow the law when sentencing him by failing to tell him what law would apply at sentencing, and that his sentence did not conform to the then-applicable law. He asserts this was manifest injustice and violated his constitutional rights.

It is clear that these proposed claims assert a federal challenge to his 1997 convictions and sentence. Thus, the district court did not err in concluding Mr. Brinkman’s proposed claims constituted successive habeas claims that require authorization under § 2244(b)(3), and we deny the motion for remand.

Mr. Brinkman's motion for remand is DENIED, his request for counsel is DENIED AS MOOT, and this matter is TERMINATED.

Entered for the Court

A handwritten signature in black ink, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk